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7 MARY HELEN BERNSTEIN, et al.,
8 Plaintiffs,
9 v.
10 UNITED STATES DEPARTMENT OF
11 HOUSING & URBAN DEVELOPMENT,
et al.,
12 Defendants.

Case No. [20-cv-02983-WHO](#)

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**ORDER ADOPTING MAGISTRATE
JUDGE'S REPORT AND
RECOMMENDATION**

Re: Dkt. Nos. 95, 98, 102

On August 16, 2021, Magistrate Judge Jacqueline Scott Corley issued a Report and Recommendation, recommending the court dismiss this case without leave to amend for failure to state a claim. Dkt. 99. Plaintiff Mary Bernstein filed an objection on August, 21, 2021, contesting the Report and Recommendation on the specific grounds that: (1) “exceptional circumstances” existed warranting the appointment of counsel; (2) judicial immunity did not bar claims brought under the Americans with Disabilities Act (“ADA”); and (3) plaintiffs were not prohibited from bringing an ADA claim against the United States Department of Housing and Urban Development (“HUD”) and the California Department of Fair Employment and Housing (“DFEH”). Obj. to R. & R. [Dkt. 102] 30, 32, 35.

Having reviewed the record in this case, I agree with Judge Corley’s Report and Recommendation and adopt it in full. My responses to Bernstein’s objections are as follows:

First, Bernstein argues that she and her co-plaintiff, Elizabeth Tigano, should be appointed counsel. *See id.* at 30. She notes in part that: “Plaintiffs have explained they do not know how to write any different or clearer than they have. Magistrate states plaintiffs do not need counsel but

1 then criticizes the writing of claims which plaintiffs do not fully comprehend.”¹ *Id.* Judge Corley
2 denied Bernstein’s first motion for appointment of counsel because the plaintiffs “had not
3 demonstrated a likelihood of success on the merits, nor . . . demonstrated that their failure to do so
4 was the result of either their difficulty articulating claims as litigants unrepresented by an attorney
5 or the complexity of the legal issues involved.” R. & R. [Dkt. 99] 11. Judge Corley denied the
6 second motion for the same reasons, additionally finding that the plaintiffs’ “numerous filings
7 demonstrate that they [are] capable of conducting legal research, presenting claims and arguments
8 in writing, and understanding legal issues.” *Id.*

9 The court “may under ‘exceptional circumstances’ appoint counsel for indigent civil
10 litigants pursuant to 28 U.S.C. § 1915(e)(1).” *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir.
11 2009). When determining whether such circumstances exist, the court must “evaluate the
12 likelihood of success on the merits as well as the ability of the petitioner to articulate his claims
13 pro se in light of the complexity of the legal issues involved.” *Weygandt v. Look*, 718 F.2d 952,
14 954 (9th Cir. 1983). Here, the primary issue is that Bernstein and Tigano have failed to state a
15 claim for which relief may be granted. I too am sympathetic to the plaintiffs’ personal
16 circumstances, along with the inherent challenges of navigating the legal system without a lawyer.
17 The plaintiffs, however, have had ample time, direction, and opportunity to address the issues in
18 their complaint. Judge Corley gave them three chances to amend their complaint, along with
19 multiple filing extensions.² See Dkt. 37, 77, 98. Her screening orders identified specific
20 shortcomings to address. See, e.g., Screening Order No. 2 [Dkt. 81] 9. She also recommended
21 that the plaintiffs consult the Legal Help Center for free assistance, which they did. *Id.*; Obj. to R.
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¹ This comment was included on an annotated screenshot of Judge Corley’s Report and
24 Recommendation, which Bernstein embedded in her objection.

25 ² In her opposition to the Report and Recommendation, Bernstein requests another stay of this
26 case. *Id.* at 47. The plaintiffs have already received multiple filing extensions totaling six months.
27 See Order Denying Motion to Stay [Dkt. 84] (detailing various extensions). I agree with Judge
28 Corley’s rationale in denying prior motions to stay: “The Court must manage its docket, ensure
expeditious resolution of litigation, and ensure defendants are not prejudiced by lengthy delays.”
Dkt. 91 at 3. Issuing a stay jeopardizes all three.

1 & R. at 14 (referencing work with two attorneys). The plaintiffs' claims fail not because of an
2 inability to articulate them. They fail because the plaintiffs have not alleged a cognizable claim
3 for relief under the applicable law.

4 Next, Bernstein alleges that her ADA claim against Alameda County Superior Court
5 judges is not barred by judicial immunity. Obj. to R. & R. at 32-35. Bernstein focuses her
6 objection on the right to counsel, which she argues is a reasonable accommodation that constitutes
7 an administrative act rather than a judicial one. *Id.* Judge Corley found that Judge Herbert, the
8 judge who denied Bernstein's request for appointment of counsel, was exercising "normal judicial
9 functions for which he is entitled to judicial immunity." R. & R. at 9. I agree with Judge Corley.
10 In denying Bernstein's request, Judge Herbert was effectively ruling on a motion, which the Ninth
11 Circuit has held is a "normal judicial function" for which judges are entitled to absolute immunity.
12 *See Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001), as amended on denial of reh'g
13 (Oct. 11, 2001).

14 Finally, Bernstein argues that Judge Corley erred by finding that the plaintiffs did not plead
15 a claim against HUD and DFEH under the ADA. Obj. to R. & R. at 35-40. It appears that
16 Bernstein believes the issue was the plaintiffs' race, conflating two of Judge Corley's findings. *Id.*
17 at 35. Judge Corley found that Bernstein and Tigano failed to state a claim under 42 U.S.C. §
18 1981 because plaintiffs pleading § 1981 claims must be members of racial minorities, and
19 Bernstein and Tigano have described themselves as white women. R. & R. at 5-6. Their race,
20 however, did not factor into the recommendation regarding the ADA claim against HUD and
21 DFEH. *Id.* at 10. Rather, Judge Corley found that the plaintiffs' ADA claim failed because
22 although they allege that HUD and DFEH "ignored their complaints and did not assist them in
23 stopping the harassment at their housing complexes . . . they do not allege that these actions were
24 taken by HUD or DFEH employees *because of* their disabilities." *Id.* (emphasis in original).

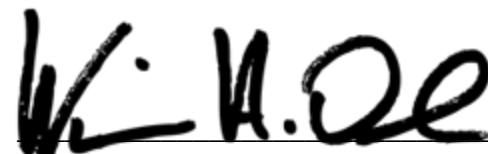
25 Judge Corley notified the plaintiffs of this issue in her second screening order. Dkt. 81 at
26 9. It appears, however, that Bernstein repeated the same arguments in her third amended
27 complaint, with no additional allegations that HUD or DFEH acted "*because of*" plaintiffs'
28 disabilities. (*Compare* Dkt. No. 77 with Dkt. No. 98). Bernstein also notes that

1 “[p]laintiffs do not know how to articulate any better.”³ Obj. to R. & R. at 43. Again, the
2 plaintiffs had multiple opportunities to add any allegations to the complaint that would sufficiently
3 plead a claim under the ADA. Because they did not do so, I agree with Judge Corley and find that
4 the plaintiffs have failed to state a claim for which relief can be granted.

5 Accordingly, this action is DISMISSED without leave to amend.

6 **IT IS SO ORDERED.**

7 Dated: October 1, 2021



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9 WILLIAM H. ORRICK
10 United States District Judge
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28 ³ This comment was included on another annotated screenshot of Magistrate Judge Corley’s Report and Recommendation, which Bernstein embedded in her objection.